A

AFFIN BANK BHD

v.

MOHD KASIM IBRAHIM

B

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
RAUS SHARIF PCA
HASHIM YUSOFF FCJ
ABDULL HAMID EMBONG FCJ
C ZAINUN ALI FCJ
[CIVIL APPEAL NO: 02(i)-36-2011(W)]
28 NOVEMBER 2012

D ***CIVIL PROCEDURE:*** *Declaratory relief - Employment contract - Employee seeking declaration over his rights and entitlements under contract of employment - Whether employee having real or genuine interest in seeking declaration - Whether locus standi established - Whether declaration granted as to validity of dismissal*

E ***CIVIL PROCEDURE:*** *Locus standi - Declaratory relief - Employee seeking declaration over his rights and entitlements under contract of employment - Whether employee having real or genuine interest in seeking declaration - Whether locus standi established*

F ***CONTRACT:*** *Contract of employment - Termination of employment - Whether termination of employment upon employee reaching age of 55 was unlawful - Employee offered employment with new employer pursuant to merger exercise - Retirement age reduced from 60 to 55 - Employee accepting new employment under protest - Whether employer unilaterally altered terms of employment contract - Whether employee entitled to work* G *until age of 60 - Whether specific performance granted under employment contract - Whether employee's dismissal invalid*

LABOUR LAW: *Employment - Termination of employment - Whether termination of employment upon employee reaching age of 55 was* H *unlawful - Employee offered employment with new employer pursuant to merger exercise - Retirement age reduced from 60 to 55 - Employee accepting new employment under protest - Whether employer unilaterally altered terms of employment contract - Whether employee entitled to work until age of 60 - Whether specific performance granted under employment* I *contract - Whether employee's dismissal invalid*

The respondent was an employee of Affin-ACF Finance Bhd ('Affin-ACF') a company within the Affin Group of Companies. Following a merger exercise, the appellant took over the business of Affin-ACF in which it integrated with the appellant in April 2005. On 26 May 2005, pursuant to the Business Transfer Agreement between Affin-ACF and the appellant, a Vesting Order dated 1 June 2005 was obtained from the High Court, transferring all of the former's assets and liabilities to the latter. The respondent was earlier informed that due to the impending merger, the respondent's employment with Affin-ACF would cease with effect from the date of merger. The appellant had offered employment to the respondent through a letter of offer dated 26 March 2005 wherein the retirement age was stated to be 55 years old. The respondent's retirement age under Affin-ACF was at 60 years old. The respondent signed the appellant's letter of offer on 3 June 2005 under protest and worked with the appellant for eight months under the less favourable terms of retirement. He was terminated on 23 February 2006 on attaining the retirement age of 55. The respondent had, previous to his acceptance, raised his dissatisfaction in respect of the retirement age of 55. However, the appellant in its e-mail communications with the respondent informed him in no uncertain terms that the retirement age for all the appellant's employees was 55 years old and not 60 years old. The respondent thus notified the appellant that he considered himself as being constructively dismissed by reason that the appellant had unilaterally altered the terms of his employment contract. The respondent subsequently filed an originating summons seeking, *inter alia*, declarations that: (i) he was entitled to work until the age of 60; (ii) his retirement at the age of 55 was unlawful; (iii) Affin Bank was bound by the Vesting Order; and (iv) the contract dated 26 March 2005 unilaterally altered the term of retirement, which was never accepted and was never agreed by him at any material time and was induced by undue influence. The High Court allowed the declaratory reliefs and the Court of Appeal upheld the High Court's decision. The appellant was granted leave to appeal to the Federal Court on the following question of law: "Whether in a merger exercise involving a Business Transfer Agreement and a Vesting Order, a previous employee of Affin-ACF can only be offered employment contract by Affin Bank on terms and conditions of employment no less favorable than those existing between the employee and Affin-ACF." The appellant submitted that: (a) the declarations granted ran contrary to the general principle of non-intervention by the

courts in termination of employment cases; and (b) the courts would not grant specific performance under an employment contract or similarly to declare that an employee's dismissal has been invalid.

Held (allowing the appeal with costs)
Per Abdull Hamid Embong FCJ (majority):

(1) The basis for seeking the declarations here was for the court to declare those rights and entitlements of the respondent and any deprivation thereto pursuant to the alleged breach of contract by the appellant, had directly affected those rights and entitlements. The respondent was therefore a person with the proper *locus standi* to claim those rights. He was not a mere bystander nor a busybody. In other words, so long as the respondent has a real or genuine interest in having his legal position declared, he can come to court to seek a declaratory judgment (*Tan Sri Hj Othman Saat v. Mohamed Ismail;* refd). (para 16)

(2) The courts will not normally make a declaration that one's dismissal is invalid, or to enforce a contract of service between employer and employee. Dismissal of an employee by an employer is never a nullity. However, there are exceptional circumstances that may exist to merit the courts' discretionary intervention by way of a declaration. (*Francis v. Municipal Councillors of Kuala Lumpur*; refd). (paras 20 & 22)

(3) Clause 7.1 of the Business Transfer Agreement qualified its application as to the obligation of the appellant to offer new contracts of employment on no less favourable terms only to employees of Affin-ACF whose wages did not exceed RM1,500 per month. As a manager whose salary exceeded this statutory qualification, (RM8,950 per month being his last drawn pay), the respondent certainly did not come within the definition of "employee" as classified under s. 2 of the Employment Act 1955 ('EA') and within the scheme under cl. 7.1. (para 32)

(4) The effect of the Vesting Order was a change of ownership in relation to the business. Affin-ACF, consequentially no longer exists as a legal entity. All contracts of employment, under this

merger exercise, automatically ended. Since the respondent was a non-EA employee, and since there were no statutory provisions governing the position of a non-EA employee, it was thus possible for the parties to regulate their relationship by entering into a new contract. With the former employment contract with Affin-ACF at an end, the appellant was at liberty to offer the respondent a fresh employment contract, *albeit* on less favourable terms. The appellant was not obliged to offer the respondent continuous employment on the same terms and conditions he previously enjoyed at Affin-ACF. (paras 37 & 40)

(5) The insistence by the respondent that his retirement age be 60 and not 55 was tantamount to a counter offer and a rejection of the original offer. Hence, the appellant was at liberty to offer a fresh contract of employment, on different terms even if less favourable to the respondent from his previous terms of employment with Affin-ACF. The letter of offer dated 26 March 2005 was a fresh offer of new employment, not of a continuous employment (*The Ka Wah Bank Ltd v. Nadinusa Sdn Bhd & Anor;* refd). (paras 42 & 44)

(6) In spite of his protest, the respondent worked with the appellant for eight months till his retirement at the age 55. The conduct of both parties, post the merger, showed that a fresh contract of employment has been agreed upon by them. The respondent was fully aware of the new terms offered to him including a new retirement age at 55. There was no misrepresentation or undue influence when the respondent accepted the new contract of employment. (paras 45-47)

Per Zainun Ali FCJ (dissenting):

(1) Affin-ACF and the appellant were in negotiation regarding the transfer of the former's business to the latter. Thus, the communication between the appellant and the respondent manifested in its 26 March 2005 letter of offer and the letter from Affin-ACF made subsequently to the respondent on 29 March 2005, including the phrenetic slew of e-mails (in protest) from the respondent to the appellant, all to which pointed to the fact that the critical document *(ie*, the 29 March 2005 letter) did not exist in a vacuum. It was not a one-off contract which called for an artless interpretation

A of the issue at hand. The documents exchanged between the parties had to be construed as a whole and as a matter of construction, the letter of 29 March 2005 followed by the "under protest" acceptance was the decisive document. In such a 'battle of forms', there is a contract as soon as the
B last of the forms (in this case, the acceptance by respondent, *albeit* under protest) is sent and received without immediate objection being taken by the appellant. (paras 94, 96 & 105)

(2) Had the appellant regarded the respondent's "under protest"
C acceptance as legally not binding, the only course of action to be taken by the appellant was to reject the respondent's conditional acceptance without further ado, and terminate his contract of employment forthwith. However, the appellant did not do that. Instead, the appellant accepted the
D respondent's employment for a good eight months thereafter. The appellant, in not terminating the respondent's service with immediate effect, had by implication, accepted the respondent's counter-offer and it was not open for it to now deny its obligation. The appellant was therefore estopped by
E conduct. (paras 106-108 & 126)

(3) The parties to the merger did not take reasonable steps to avoid being tagged with constructive notice of the appellant's undue influence over the respondent. Neither the
F potential extent of the respondent's liability had been explained to him nor had the respondent ever received independent advice. The respondent was given a copy of the Business Transfer Agreement and Vesting Order only after his 'forced' retirement. A substantial change had been made
G to the respondent's working conditions which was to his detriment. (para 128)

(4) Given the tenor of the Business Transfer Agreements and the Vesting Order, the appellant had breached these instruments in not honouring the respondent's Employment
H Contract of 3 January 2000 and had not given him his vested rights under the two instruments which legally bound the appellant. (para 175)

I

Bahasa Malaysia *Translation Of Headnotes*

Responden adalah seorang pekerja Affin-ACF Finance Bhd ('Affin-ACF'), sebuah syarikat dalam Kumpulan Syarikat Affin. Ekoran suatu penggabungan, perayu telah mengambil alih perniagaan Affin-ACF dan penyepaduan perniagaan dilakukan pada April 2005. Berikutnya, pada 26 Mei 2005, dengan berasaskan kepada Perjanjian Pemindahan Perniagaan di antara Affin-ACF dan perayu, suatu Perintah Letakhak bertarikh 1 Jun 2005 telah diperolehi dari Mahkamah Tinggi, memindahkan keseluruhan aset dan liabiliti Affin-ACF kepada perayu. Responden sebelum itu telah dimaklumkan bahawa disebabkan oleh penggabungan yang akan dilakukan, pekerjaan responden dengan Affin-ACF akan berakhir berkuatkuasa dari tarikh penggabungan. Perayu telah menawarkan pekerjaan kepada responden melalui suatu surat bertarikh 26 Mac 2005 di mana umur persaraan ditetapkan pada 55 tahun. Umur persaraan responden ketika dengan Affin-ACF adalah 60 tahun. Responden menandatangani surat tawaran perayu pada 3 Jun 2005 dengan protes dan bekerja dengan perayu di bawah terma persaraan yang kurang baik selama lapan bulan. Beliau telah diberhentikan kerja pada 23 Februari 2006 setelah mencapai umur 55 tahun. Responden, sebelum menerima tawaran, telah membangkitkan ketidaksenangannya berkaitan umur persaraan 55 tahun. Bagaimanapun, perayu, melalui e-melnya kepada responden, menjelaskan bahawa umur persaraan bagi semua pekerja-pekerja adalah 55 tahun dan bukannya 60 tahun. Apapun, responden memberitahu perayu bahawa beliau menganggap dirinya sebagai telah dibuang kerja secara konstruktif, disebabkan perayu dengan bersendirian dan secara sebelah pihak, telah mengubah terma-terma kontrak pekerjaannya. Responden juga berikutnya memfailkan saman pemula memohon, antara lain, deklarasi bahawa: (i) beliau berhak bekerja sehingga umur 60 tahun; (ii) persaraannya pada umur 55 tahun adalah tak sah; (iii) Affin Bank terikat dengan Perintah Letakhak; dan (iv) kontrak bertarikh 26 Mac 2005 telah secara unilateral mengubah terma persaraannya, yang, selain dicemari oleh pengaruh tidak wajar, tidak pernah diterima atau dipersetujui oleh beliau pada semua waktu material. Mahkamah Tinggi membenarkan relif deklaratori dan Mahkamah Rayuan telah mengesahkan keputusan Mahkamah Tinggi. Perayu diberi kebenaran untuk merayu ke Mahkamah Persekutuan atas persoalan undang-undang berikut, iaitu: "Sama ada, dalam penggabungan yang melibatkan Perjanjian Pemindahan Perniagaan dan Perintah Letakhak, seorang pekerja terdahulu Affin-ACF hanya boleh

A ditawarkan kontrak pekerjaan berasaskan terma-terma dan syarat-syarat yang tidak kurang baiknya dari yang tertera di antara pekerja tersebut dengan Affin-ACF." Perayu berhujah bahawa: (a) deklarasi yang dibenarkan bertentangan dengan prinsip am tidak campur tangan mahkamah dalam kes-kes penamatan pekerjaan; dan
B (b) mahkamah tidak seharusnya membenarkan pelaksanaan spesifik di bawah kontrak pekerjaan atau mengisytiharkan bahawa pembuangan kerja seseorang pekerja adalah tak sah.

Diputuskan (membenarkan rayuan dengan kos)
C **Oleh Abdull Hamid Embong HMP (majoriti):**

(1) Asas untuk mendapat deklarasi di sini adalah supaya mahkamah mengisytiharkan hak-hak responden dan bahawa apa jua penafian hak-hak tersebut akibat daripada pelanggaran kontrak oleh perayu telah menjejaskan hak-hak responden tersebut.
D Responden dengan itu adalah seorang yang mempunyai *locus standi* untuk mendapat dan menuntut hak-hak berkenaan. Beliau bukanlah seorang "bystander" atau pengacau. Dengan kata lain, selagi mana responden mempunyai kepentingan sebenar dan tulen untuk pengisytiharan kedudukannya di sisi
E undang-undang, beliau boleh mendapatkan relif deklaratori daripada mahkamah (*Tan Sri Hj Othman Saat v. Mohamed Ismail;* dirujuk).

(2) Mahkamah biasanya tidak membuat deklarasi bahawa
F pembuangan kerja seseorang adalah tak sah, atau untuk melaksanakan suatu kontrak pekerjaan di antara majikan dan pekerja. Namun, wujud kecualian-kecualian di mana campur tangan budi bicara mahkamah melalui deklarasi adalah wajar dan dibolehkan *(Francis v. Municipal Councillors of Kuala*
G *Lumpur;* dirujuk).

(3) Fasal 7.1 Perjanjian Pemindahan Perniagaan mensyaratkan pemakaiannya berkaitan dengan obligasi perayu untuk menawarkan kontrak pekerjaan baru yang tidak kurang baiknya
H hanya kepada pekerja-pekerja Affin-ACF yang gaji mereka tidak melebihi RM1,500 sebulan. Sebagai seorang pengurus yang gajinya melebihi syarat statutori ini (gaji terakhir yang diterimanya ialah RM8,950 sebulan), responden tentunya tidak dirangkumi oleh definisi "pekerja" seperti yang ditakrif di
I bawah s. 2 Akta Pekerjaan 1955 ('AP') serta oleh skim di bawah Fasal 7.1.

(4) Perintah Letakhak membawa kesan menukar pemilikan perniagaan. Affin-ACF dengan itu tidak lagi wujud sebagai satu entiti undang-undang. Juga, semua kontrak pekerjaan di bawah pelaksanaan penggabungan berakhir secara automatik. Oleh kerana responden bukan seorang pekerja di bawah AP, dan tidak ada peruntukan statut yang mengawalselia kedudukan seorang pekerja yang tidak tertakluk kepada AP, maka ianya terbuka untuk pihak-pihak mengawal perhubungan mereka dengan memasuki satu kontrak baru. Oleh yang demikian, memandangkan kontrak-kontrak pekerjaan terdahulu dengan Affin-ACF sudahpun berakhir, perayu bebas menawarkan kontrak pekerjaan baru, walaupun atas terma-terma yang kurang baik. Perayu tidak bertanggungan untuk menawarkan kepada responden sambungan pekerjaan atas terma dan syarat yang sama seperti yang didapati daripada Affin-ACF.

(5) Pengataan berterusan responden bahawa umur persaraannya adalah 60 tahun dan bukannya 55 tahun telah menjadi suatu tawaran balas serta penolakan terhadap tawaran asal. Oleh itu, perayu mempunyai kebebasan untuk menawarkan suatu kontrak pekerjaan baru kepada responden, atas terma-terma yang berbeza, atau yang kurang baik dari terma-terma kontraknya yang terdahulu dengan Affin-ACF. Surat tawaran bertarikh 26 Mac 2005 adalah suatu tawaran pekerjaan yang baru, bukannya sambungan kepada pekerjaan terdahulu (*The Ka Wah Bank Ltd v. Nadinusa Sdn Bhd & Anor;* dirujuk).

(6) Walaupun memprotes, responden terus bekerja dengan perayu selama lapan bulan sehingga persaraannya pada umur 55 tahun. Kelakuan kedua-dua pihak, pasca penggabungan, menunjukkan bahawa suatu kontrak pekerjaan baru telah dipersetujui oleh mereka. Responden menyedari akan terma-terma baru yang ditawarkan kepadanya termasuk umur persaraan baru pada umur 55 tahun. Tidak ada representasi salah atau pengaruh tidak wajar bilamana responden menerima kontrak pekerjaan baru.

Oleh Zainun Ali HMP (menentang):

(1) Affin-ACF dan perayu telah berunding mengenai pemindahan perniagaan pihak terdahulu kepada pihak terkemudian. Adalah nyata bahawa komunikasi di antara perayu dengan responden, dalam bentuk surat tawaran bertarikh 26 Mac 2005 dan surat daripada Affin-ACF kemudiannya kepada responden bertarikh

29 Mac 2005, termasuk e-mel-e-mel yang dihantar (sebagai protes) oleh responden kepada perayu, kesemuanya menunjuk kepada fakta bahawa dokumen kritikal (iaitu surat 29 Mac 2005) tidaklah wujud di dalam vakum. Ia bukan suatu kontrak one-off yang menuntut suatu pentafsiran sempit terhadap isu-isu berbangkit. Dokumen-dokumen yang bertukar antara pihak-pihak harus ditafsir secara menyeluruh, dan sebagai suatu perkara tafsiran, surat bertarikh 29 Mac 2005 yang diikuti penerimaan 'dengan protes' adalah merupakan dokumen pemutus. Dalam 'battle of forms' sedemikian, kontrak wujud sebaik sahaja 'form' terakhir (dalam kes ini, penerimaan dengan protes responden), telah dihantar dan diterima tanpa apa-apa bantahan oleh perayu.

(2) Sekiranya perayu menganggap penerimaan 'dengan protes' responden sebagai tidak mengikat di sisi undang-undang, satu-satunya tindakan yang harus diambil perayu ialah menolak dengan cepat penerimaan bersyarat responden, dan menamatkan dengan serta merta kontrak pekerjaannya. Tetapi ini tidak dibuat oleh perayu. Perayu sebaliknya menerima pekerjaan responden untuk tempoh lapan bulan selanjutnya. Dengan tidak menamatkan pekerjaan responden dengan serta merta, perayu secara implikasi telah menerima tawaran semula responden dan adalah tidak terbuka baginya kini untuk menafikan obligasinya. Dengan itu, perayu telah diestop oleh kelakuannya.

(3) Pihak-pihak kepada percantuman tidak mengambil langkah-langkah munasabah bagi mengelak dari dipalitkan notis kontruktif pengaruh tidak wajar perayu terhadap responden. Tahap liabiliti responden tidak pernah dijelaskan kepadanya, dan begitu juga tiada nasihat bebas diterima oleh responden. Responden diberikan salinan Perjanjian Pemindahan Perniagaan dan Perintah Letakhak hanya selepas persaraan "terpaksa"nya. Perubahan yang banyak telah dibuat kepada syarat-syarat kerja responden secara yang menjejaskan beliau.

(4) Mengambilkira isi Perjanjian Pemindahan Perniagaan dan Perintah Letakhak, perayu telah melanggar instrumen-instrumen tersebut dengan tidak menghormati Kontrak Pekerjaan responden bertarikh 3 Januari 2000 dan tidak menunaikan hak diri responden di bawah kedua-dua instrumen yang mengikat perayu di sisi undang-undang.

Case(s) referred to:

Barat Estates Sdn Bhd & Anor v. Parawakan Subramaniam & Ors [2000] 3 CLJ 625 CA ***(refd)***

Barber v. Manchester Regional Hospital Board [1958] 1 All ER 323 ***(refd)***

British Road Services Ltd v. Arthur Crutchley & Co Ltd [1968] 1 Lloyd's Rep 27 ***(refd)***

Brogden v. Metropolitan Railway Co [1877] 2 App Cas 666 ***(refd)***

Butler Machine Tool Co Ltd v. Ex-Cell O Corporation (England) Ltd [1979] WLR 401 ***(refd)***

Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor [1987] 2 CLJ 36; [1987] CLJ (Rep) 504 HC ***(refd)***

Francis v. Municipal Councillors of Kuala Lumpur [1962] 3 All ER 633 ***(refd)***

Hart v. O' Connor [1985] AC 1000 ***(refd)***

Hill v. CA Parsons Ltd [1972] Ch 305 ***(refd)***

Howes v. Gosford SC [1962] NSWR 58 ***(refd)***

HvalfangerselKapet Polaris A/S v. Unilever Ltd [1933] 46 Lloyds Rep 29 ***(refd)***

Hyde v. Wrench [1840] 3 Benv 334 ***(refd)***

Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors [1997] 2 CLJ 131 CA ***(refd)***

Mohd Ahmad v. Yang DiPertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 3 CLJ 135 FC ***(refd)***

Nokes v. Doncaster Amalgamated Collieries Ltd [1940] AC 1014 ***(refd)***

OTM Ltd v. Hydranautic [1981] 2 Lloyd's Resp 211 ***(refd)***

Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprises Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

Prem v. Simmonds [1971] 1 WLR 138 ***(refd)***

Radtha Raju & 358 Ors v. Dunlop Estates Bhd [1996] 1 CLJ 755 CA ***(refd)***

Reardon Smith Line Ltd v. Yngvar Hansen – Tangen [1976] 1 WLR 989 ***(refd)***

Ridge v. Baldwin [1964] AC 40 ***(refd)***

Rigby v. Ferodo Ltd [1987] IRLR 516 ***(refd)***

Russian Commercial and Industrial Bank v. British Bank for Trade Ltd [1921] 2 AC 438 ***(refd)***

Saad Marwi v. Chan Hwan Hua & Anor [2001] 3 CLJ 98 CA ***(refd)***

See Teow Chuan & Anor v. YAM Tunku Nadzaruddin Ibni Tuanku Jaafar & Ors [2007] 2 CLJ 82 CA ***(refd)***

Shore v. Wilson [1842] 9 cl And Fin 355 ***(refd)***

Stansell Ltd (formerly Stansell (builders) Ltd v. Co-Operative Group (CWS) Ltd [2006] 1 WLR 1704 ***(refd)***

Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 1 LNS 2 FC ***(refd)***

The Ka Wah Bank Ltd v. Nadinusa Sdn Bhd & Anor [1998] 2 CLJ 486 FC ***(refd)***

Trollope and Cells Ltd v. Atomic Power Constructions Ltd [1962] 3 All ER 1035 ***(refd)***

Vine v. National Dock Labour Board [1957] AC 488 ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, ss. 50(1), (3)
Companies Act 1965, s. 178
Contracts Act 1950, s. 7
Employment Act 1955, s. 2
Industrial Relations Act 1967, s. 20(1)

Companies Act 1929 [UK], s. 154
Companies Act 1985 [UK], s. 427
Industrial and Provident Societies Act 1965 [UK], ss. 51(1), 54

Other source(s) referred to:
Halsbury's Laws of England 2nd edn, p 137

For the appellant - A Ramadass; M/s Ramadass & Assocs
For the respondent - Bhavanash Sharma; M/s Gill & Tang

[Appeal from Court of Appeal, Civil Appeal No: W-02(IM)-2654-10]

Reported by Amutha Suppayah

JUDGMENT

Abdull Hamid Embong FCJ:

[1] The background facts to this dispute are not contentious and we are grateful to counsel of both parties for having highlighted them in their respective written submissions. Suffice that we adopt those relevant facts as found in the appellant's written submission, with some editing:

(a) The respondent was an employee of Affin-ACF Finance Berhad ("Affin-ACF") a company within the Affin Group of Companies.

(b) In March 2005, all the employees of Affin-ACF including the respondent, were informed by its Chief Executive Officer in respect of an impending change of ownership of Affin-ACF wherein the appellant was to take over the business of Affin-ACF in which it will integrate with the appellant in April, 2005, ie, a merger exercise was in the offing.

(c) On 26 May 2005, pursuant to the Business Transfer Agreement between Affin-ACF and the appellant, and on their joint application, a Vesting Order was obtained from the High

Court, transferring all of the former's assets and liabilities to the latter. The effective date of the vesting was on 1 June 2005.

(d) Affin-ACF then informed the respondent of the impending merger as a result of which the respondent's employment with Affin-ACF would cease with effect from the date of merger. In the same letter Affin-ACF's Chief Executive Officer had noted that the appellant had offered employment to the respondent through an earlier letter of offer by the appellant dated 26 March 2005.

(e) The respondent was further informed by Affin-ACF that if he chose to accept the appellant's offer of employment made *vide* the appellant's letter dated 26 March 2005 and left the employment of Affin-ACF on or before the date of the Vesting Order ie, 26 May 2005, Affin-ACF was prepared to waive the requirement for the respondent to give notice of termination of the respondent's employment. The 26 March 2005 letter had set out the terms of employment offered to the respondent, amongst other, that the retirement age is 55 years old.

(f) The respondent in the reply slip which was undated, wrote to the CEO of Affin-ACF stating that he was accepting the applicant's offer of employment under protest; although no reason was given for that qualified acceptance. The respondent signed the letter of offer on 3 June 2005 under protest and worked with the appellant under the now less favourable terms for eight months. He was terminated on 23 February 2006 on attaining the retirement age of 55.

(g) The respondent had, previous to his acceptance, communicated with the appellant when he raised his unhappiness in respect of the retirement age of 55 as stipulated in cl. 6 of the offer letter dated 26 March 2005. He had also informed the appellant of his concern in respect of some outstanding loans he had with Affin-ACF wherein he had agreed with Affin-ACF to service the loans until he attained the age of 60. The loans were taken by the respondent during his employment tenure with Affin-ACF.

A (h) The appellant in its e-mail communications with the respondent had informed him in no uncertain terms that the retirement age for all the appellant's employees was 55 years old and not 60 years old. The respondent was also informed that when he reached his retirement age all outstanding loans
B that he may have at that juncture will be converted to those of commercial rates as applicable to all employees of the appellant.

(i) The appellant subsequently notified the respondent on
C 21 October 2005 that he would be attaining the age of retirement on 23 February 2006 and was reminded that he will be retired by the appellant on the said date. The appellant later again notified the respondent through a letter dated 16 January 2006 that he was attaining the age 55 on 23 February
D 2006 and therefore the respondent would be retired from service by the appellant on that date. The respondent however through a letter dated 27 January 2006 insisted that his retirement age was 60 years old as stated in a handbook of Affin-ACF, his previous employer.

E (j) In 9 February 2006 the appellant again notified the respondent its stand as stated in its letter dated 16 January 2006, that the respondent would be retired on 23 February 2006.

F (k) On 22 February 2006, the respondent wrote a letter to the appellant to notify that he considered himself as constructively dismissed by reason that the appellant had unilaterally altered the terms of his employment contract.

G (l) The respondent subsequently lodged a complaint with the Industrial Relations Department pursuant to s. 20(1) of the Industrial Relations Act 1967 against the appellant alleging that the appellant had dismissed him effective from 22 February 2006 without just cause or excuse. The Industrial
H Relations Department sought to settle the dispute amicably through conciliation meetings. Subsequently, when the conciliation attempts failed, the dispute was referred by the Minister of Human Resources Malaysia to the Industrial Court for adjudication.

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(m) The respondent's case was set down for trial on 5 September 2007, 1 October 2007 and 2 October 2007. The respondent during his testimony before the Industrial Court testified that he no longer wished for a reinstatement as a remedy and as such the Industrial Court on 10 October 2007 called up the solicitors of the respective parties to address the issue on whether the Industrial Court had the jurisdiction to continue to hear the respondent's case in view of the respondent's testimony that he did not want reinstatement as a remedy.

(n) The respondent on 25 January 2008 withdrew his case at the Industrial Court.

(o) The respondent subsequently filed an originating summons dated 20 August 2009 before the High Court and sought certain declaratory reliefs and orders against the appellant.

(p) The High Court in its order dated 11 August 2010 allowed the declaratory reliefs and orders sought by the respondent.

(q) Being dissatisfied with the High Court's order, the appellant filed an appeal to the Court of Appeal.

(r) The Court of Appeal after hearing the parties dismissed the appellant's appeal with cost of RM50,000,

(s) The appellant then filed an application for leave to appeal to the Federal Court.

[2] Leave of this court was granted on this sole question of law:

> Whether in a merger exercise involving a Business Transfer Agreement and a Vesting Order, a previous employee of Affin-ACF can only be offered employment contract by Affin Bank on terms and conditions of employment no less favorable than those existing between the employee and Affin-ACF.

[3] The only issue that arose in this appeal as commonly identified by both parties, is whether the appellant is obliged to offer employment on "no less favourable terms" to all employees (including the respondent), particularly with regard to the age of retirement.

[4] The stand taken by the respondent is that:

(a) Appellant ought to have honoured the age of retirement term made available by Affin-ACF in the employment contract and maintained that all executives including the respondent who were absorbed by the appellant could opt to retire at the age of 60 years by making reference to Order 5 of the Vesting Order.

(b) Order 5 of the Vesting Order legally required the appellant to offer the respondent a continuous employment on terms not less favorable and by unilaterally imposing a shorter retirement age on the respondent, the appellant had offered him less favourable terms and this amounted to a breach of Order 5 of the said Vesting Order.

[5] In the High Court the respondent had sought for various declarations, which were granted, namely:

(a) that the plaintiff was entitled to work until the age of 60;

(b) that the plaintiff's retirement at the age of 55 was unlawful;

(c) that Affin Bank was bound by the Vesting Order dated 26 May 2005;

(d) that the contract dated 26 March 2005 unilaterally altered the term of retirement, which was never accepted and was never agreed by the plaintiff at any material time and was induced by "undue influence";

(e) that the plaintiff was entitled to ESOS that was offered before 22 February 2005; and

(f) that the plaintiff did not owe Affin Bank any housing loan, car loan and sundry loan.

[6] And also for the following relief:

Damages for breach of contract for loss of income for five years, loss of EPF contribution, loss of medical coverage, loss of staff housing loan, loss of staff vehicle loan, loss of sundry loan, loss of insurance coverage, loss of bonus, loss of ESOS and the plaintiff also sought for general damages for breach of contract and general and or aggravated damages, interest and costs on a solicitor-client full indemnity basis.

[7] The respondent's case stood on the argument that the appellant needs to honour all of Affin-ACF's contracts, which includes the respondent's employment contract by virtue of the operation of order 5 under the Vesting Order, which states:

> On and from the Effective Date, any existing agreement to which AACF was a party to or any AACF Contracts (as defined under the Business Transfer Agreement) to have effect as if ABB had been a party thereto instead of AACF.
>
> (Note: AACF refers to Affin-ACF, ABB refers to the appellant)

[8] The respondent also submitted that the Business Transfer Agreement of 6 May 2005, which was entered into by the appellant and Affin-ACF and their shareholders, defines the Affin-ACF's contracts as "any agreements, contracts, deeds, indentures, deed polls or instruments to which Affin-ACF is or has ever been a party." As such the forced retirement of the respondent before he attained the retirement age of 60 was in breach of the respondent's employment contract with Affin-ACF dated 3 January 2000. The appellant, it was contended, was also in breach of the terms stipulated in the staff handbook of Affin-ACF which stated the retirement age of the respondent as 60 and not 55, when it gave notice to the respondent that his last day of service was 22 February 2006 (ie, on the respondent attaining the age of 55).

[9] The learned Judicial Commissioner agreed with this argument when he held that the appellant had breached Order 5 of the Vesting Order in imposing a retirement age of 55 on the respondent, thereby effectively offering him a term which was less favourable to what he was enjoying with Affin-ACF. His Lordship in his findings said *inter alia* that:

> There is the principle of the sanctity of contract that must be upheld here with all its seriousness and solemnity as affecting the livelihood of the employee and more so when it is a single, sole and solitary soul pitted against the structure and strength of a solid bank.

[10] The Court of Appeal had affirmed those findings and reasons of the High Court.

[11] The learned Judicial Commissioner had also referred to and followed the Industrial Court's award in *Mohd Shaharom & Anor v. Affin Bank*, ICM Case 11/4-1733/07 (Award No. 505 of 2009)

as affirmed by the High Court on a judicial review application (R1-25-196-2009). The facts in *Mohd Shaharom* are almost similar to that of this case. The Industrial Court found that Affin Bank (the appellant in the present appeal) had been guilty of a breach of contract when it unilaterally varied the contract of employment with the claimants, without their consent and offering them new terms of employment which are less favourable than when they were with Affin-ACF. The learned chairman in assessing the evidence found that the claimants, who were executives (and thus not employees by definition under the Employment Act 1955) had been given an assurance by witness COW1, the assistant to the Head of Human Resources Department of Affin Bank that their contracts would be renewed on an annual basis once they retire at 55 and that yearly renewals would be continued until they reached 60. This crucial feature thus differentiates that case from ours.

[12] Before us, the appellant relied on two main grounds. The first ground was centred on the argument that the High Court had erroneously granted the orders for declarations and that such declarations run contrary to the general principle of non-intervention by the courts in termination of employment cases. This first ground was argued in two parts, the first argument questioning the standing of the respondent to obtain the declarations, and the second argument focusing on the general principle that the courts would not grant specific performance under an employment contract or similarly to declare that an employee's dismissal has been invalid.

First Argument: *Locus Standi* Of The Respondent

[13] The appellant submitted that the Vesting Order of 26 May 2005 was to give effect to the Business Transfer Agreement of 6 May 2005 and that that agreement was entered into by the appellant, Affin-ACF and the appellant's shareholders. The respondent, it was contended was never a party to the Business Transfer Agreement and as such had no standing in the first place to seek for a declaration on it. The decisions of both the High Court and the Court of Appeal to allow those declarations, as such had been in error since the respondent lacks the necessary *locus standi* to apply.

[14] With respect, we cannot agree with the appellant that the respondent lacks *locus standi* to apply for those declarations.

[15] A declaration merely declares the right of the parties. As such, a person seeking for a declaratory judgment need not show or establish a cause of action. He merely needs to show his interest in the issue at hand. (see *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprises Sdn Bhd* [1978] 1 LNS 143). We agree with Siti Norma J (as Her Ladyship then was) in *Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor* [1987] 2 CLJ 36; [1987] CLJ (Rep) 504 when she made this finding on the standing of one seeking for a declaration:

> the defendants have argued that this action is not maintainable by the plaintiff as it is not a party to the first agreement and being a stranger cannot sue on the agreement. I do not consider that this argument holds any merit as the plaintiff is not suing on the agreement as such but is trying to establish a right given to it under the agreement and to that extent, seeks a declaration that it is a tenant of the defendants. PW Young in his book on *Declaratory Orders,* 2nd. Ed., defines a declaratory judgment as one that does not involve a cause of action in the usual sense and that six factors must be present before there can be a declaratory order. These are:
>
> (1) There must exist a controversy between the parties.
>
> (2) The proceedings must involve a "right".
>
> (3) The proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as "standing" or "*locus standi*".
>
> (4) The controversy must be subject to the court's jurisdiction.
>
> (5) The defendant must be a person having a proper or tangible interest in opposing the plaintiff's claims.
>
> (6) The issue must be ripe, i.e. it must not be of academic interest, hypothetical or one whose resolution would be of no practical utility.
>
> All these six conditions are met by the facts of this case and there is therefore no merit to the defendants' contention that the plaintiff's claims cannot be maintained.

[16] The basis for seeking the declarations here is for the court to declare those rights and entitlements of the respondent and any deprivation thereto pursuant to the alleged breach of contract by

A the appellant, had directly affected those rights and entitlements. The respondent was therefore a person with the proper *locus standi* to claim those rights. He was not a mere bystander nor a busybody. In other words, so long as the respondent has a real or genuine interest in having his legal position declared, he can
B come to court to seek for a declaratory judgment.

[17] The test of standing in a proceeding for a declaration was propounded by Lord Dunedin in *Russian Commercial and Industrial Bank v. British Bank for Trade Ltd* [1921] 2 AC 438, which is that
C one needs no more than to show a 'real interest' in the suit. This test was applied here in *Tan Sri Hj Othman Saat v. Mohamed Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177 where the Federal Court held:

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> Although it is not necessary for a plaintiff who seeks relief by way of declaratory judgment to show that he has a present cause of action, he must be somebody with such an interest in the subject-matter of the action as to justify his seeking relief

It cannot be doubted that the respondent had a legitimate
E grievance and there was a threat to his private right by the appellant. He certainly met the "real interest" test to acquire a *locus standi* to seek for the said declarations. The High Court too was aware of this limitation when it stated that "declaratory relief would be refused to spectators, speculators and busybodies".

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Second Argument: Whether Declarations Possible?

[18] The second limb of the appellant's argument on this issue of whether the respondent was entitled to the declarations is grounded on the question of whether the court was entitled to
G make an order for a specific performance in respect of the terms of the employment contract between Affin-ACF and the respondent. It was argued for the appellant that, by declaring that the respondent was entitled to work till he attained 60 years the court was actually imposing a different term in the respondent's
H employment and requiring the appellant to perform that term. It was also contended that specific performance of contracts of service cannot be granted.

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[19] The law on this issue can be gleaned from this paragraph from PW Young QC on *Declaratory Orders* (2nd edn) which crisply describes the principle in this manner: A

> Traditionally, the law is that if an employer purports to dismiss an employee, then even though that is a breach of contract or is invalid or is otherwise defective, none the less there is a dismissal and the contract of employment is terminated, subject, of course, to a claim for damages for breach of contract. The rationale of this is that persons who are incompatible should not be continually yoked together in an employment bond. Indeed, the traditional principle is the common situation of a person having power but no right to do something which if he does it, terminates the contract, but allows the aggrieved person to sue in damages. See *Williamson v. The Commonwealth* [1907] 5 CLR 174 at 185-6 and *Automatic Fire Sprinklers Pty Ltd v. Watson* [1946] 72 CLR 435.

B C

[20] Thus, the courts will not normally make a declaration that one's dismissal is invalid, or to enforce a contract of service between employer and employee and this is trite law. Dismissal of an employee by an employer is never a nullity. (see *Howes v. Gosford SC* [1962] NSWR 58). Reference was made to the case of *Mohd Ahmad v. Yang DiPertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 3 CLJ 135 where the Federal Court held that "the law will not specifically enforce a contract of service between master and servant and that the master has always the power to dismiss the servant in breach of such contract without any danger of being compelled to re-employ him". The dismissal in that instance remains effective and the only remedy lies in damages. (see *Barber v. Manchester Regional Hospital Board* [1958] 1 All ER 323). D E F

[21] The general law is also expressed by Lord Reid in *Ridge v. Baldwin* [1964] AC 40 in these words: G

> There cannot be specific performance of a contract of service, and the master can terminate the contract at any time and for any reason or for none.

H

[22] But there are exceptional cases or circumstances that may exist to merit the courts' discretionary intervention by way of a declaration. This was recognized by the Privy Council in *Francis v. Municipal Councillors of Kuala Lumpur* [1962] 3 All ER 633. In that case the Privy Council restated the general principle that I

courts would not grant specific performance of contracts of service and declared that "special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court." (per Lord Morris of Borth-y-Gest).

[23] One instance of that special circumstance can be found in the case of *Vine v. National Dock Labour Board* [1957] AC 488 where the House of Lords granted a declaration, which if not granted, would condemn the plaintiff to be forever barred from carrying on his occupation as a wharf labourer. The House of Lords also reiterated the principle that damages is the only remedy for breach of contract between master and servant. In *Hill v. CA Parsons Ltd* [1972] Ch 305, the English Court of Appeal restrained an employer from terminating an employee's contract because in the circumstances, damages was found to be not an adequate remedy.

[24] In the instant appeal before us, the High Court had granted the declarations asked for without mulling over on the general principle of non intervention by the courts in an employer-employee contractual relationship that we have just mentioned. Instead the learned Judicial Commissioner relied on the decision of *See Teow Chuan & Anor v. YAM Tunku Nadzaruddin Ibni Tuanku Jaafar & Ors* [2007] 2 CLJ 82 which held that a unilateral imposition of the retirement age on the plaintiff was unlawful and allowed the plaintiff to continue as an executive director on a personal to holder basis until 70 years of age. Based on that authority, the High Court here went on to grant the declaration that the respondent should be entitled to work until 60, with a qualification that it should not be interpreted as granting an order of specific performance. The Court of Appeal in *See Teow Chuan* also opined that the declaration it ordered did not amount to a specific performance of a service contract. A perusal of that case shows that the reason for allowing that declaration was merely to prevent so much of the board's resolution which required executive directors to retire upon attaining 55 years of age. It was, in our opinion, a case peculiar to its own facts and circumstances. It was for this reason that the Court of Appeal in granting the declaration made a qualification that it did not have the effect of a specific performance. With respect we feel that this is not an

appropriate decision to be applied to the instant case before us. On this aspect, it may be worthwhile to reproduce these words of advice of LC Lord Halsbury who over a century ago said:

> a case is only an authority for what it actually decides.
>
> (*Quinn v. Leathem* [1901] AC 495).

So, in quoting a decision as authority for a legal proposition, the logic of that decision should be confined to the context of that decision itself. (see *NMCR Annual Lecture Series 2012 Judicial Precedent – Taming of Common Law* by Lord Carnwath of Notting Hill JSC)

[25] Has the learned Judicial Commissioner correctly exercised his discretion in granting those declarations sought by the respondent? The basis of His Lordship's granting them was the sanctity of contracts, which in this case was said to have been dishonoured by the appellant in shortening the respondent's years of employment. At first glance the respondent's contention that he was entitled to continuous employment on no less favourable terms plus the fact that he was offered a new contract which lasted a mere eight months under the alleged unilateral variation of the retirement age of 60 term without any compensation, posed a legal question, would make a declaration possible as an exception to the general rule. In short, there are seemingly special circumstances for the High Court to exercise its discretion. (*Francis*'s case). This was recognised in passing by the learned Judicial Commissioner in His Lordship's judgment which held that the appellant had been wrong to change a key term of the contract like the retirement age.

[26] Next is for us to ponder if the High Court had been right to grant those declarations. Put differently, were there special circumstances to make it just and proper to grant those declarations? This brings into focus the second ground raised in the appellant's submission, which we now address.

Second Ground

[27] Learned counsel of the appellant referred us to cl. 7.1 of the Business Transfer Agreement which he said excludes the respondent as an "employee" because he does not fall under the

A definition of "employee" under the Employment Act 1955 (EA). This, to us was a more substantial argument which deserves serious consideration.

[28] Clause 7.1 of the Business Transfer Agreement states:

B

> 7.1 Re-employment
>
> ABB shall, within 7 Business Days of the Effective Date offer to continue to employ all existing employees of AACF under terms and conditions of employment which are not less favourable than
C those under which the employees were previously employed before the merger in accordance with Regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulation 1980. *For the purpose of this section, the expression "employee" shall have the meaning assigned to it under the Employment Act 1955.* (emphasis added).

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[29] Thus, learned counsel contended that it was never the intention of Affin-ACF or the appellant to have the respondent's previous contract of service transferred through the Business Transfer Agreement, since he did not come within the class of
E employees intended under that clause.

[30] Under s. 2 of the EA an 'employee' is defined as follows:

> 'employees' means any person or class of persons:
>
> F (a) included in any category in the first schedule to the extent specified therein; or
>
> (b) (not applicable);

[31] Meanwhile, the First Schedule to the EA defines an
G 'employee' as meaning:

> 1. Any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages do not exceed one thousand five hundred ringgit a month. (now RM2,000 – *vide* PU(A)88/2012)

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[32] Clause 7.1 of the Business Transfer Agreement has thus, in our view, qualified its application as to the obligation of the appellant to offer new contracts of employment on no less favourable terms only to employees of Affin-ACF whose wages do

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not exceed RM1,500 per month. As a manager whose salary exceeds this statutory qualification, (RM8,950 per month being his last drawn pay) the respondent certainly does not come within the definition of "employee" as classified under s. 2 of the EA and within the scheme under cl. 7.1.

[33] Next, it was strongly urged by the appellant that the Vesting Order did not have the effect of assigning or transferring all contracts of Affin-ACF to the appellant, including employment contracts. Learned counsel submitted that it is a fundamental principle in our employment law that an employee cannot be transferred from one employer to another without the consent of the employee. At common law, "a contractual right to personal service was a personal right of the employer and was incapable of being transferred by him to anyone else and that a duty to serve a specific master could not be part of the property or rights of that master capable of becoming, by transfer, a duty to serve someone else". (per Viscount Simon LC in *Nokes v. Doncaster Amalgamated Collieries Ltd* [1940] AC 1014)

[34] Learned counsel referred to the cases of *Radtha Raju & 358 Ors v. Dunlop Estates Bhd* [1996] 1 CLJ 755 and *Barat Estates Sdn Bhd & Anor v. Parawakan Subramaniam & Ors* [2000] 3 CLJ 625 in support of the proposition that an employee cannot be transferred at the whim of his employer just by a stroke of a pen in an agreement, to which the employee is not a party. An employee, it was submitted is not a chattel to be traded or transferred at the employer's wish. Thus, said learned counsel, a Vesting Order cannot in law unilaterally transfer a contract of employment from one employer to another, since it is against the fundamental principle that an employee cannot be compelled by his employer to continue his employment with another employer. He must be given notice so that he can make a choice.

[35] It was also argued by the appellant that it has no obligation in law to offer the respondent continuous employment on the same terms and conditions he enjoyed previously, notwithstanding the Vesting Order and the Business Transfer Agreement entered between the appellant and Affin-ACF.

[36] Further, it was submitted that the respondent had voluntarily accepted a new contract with terms and conditions offered to him although under protest. The respondent cannot be allowed to approbate and reprobate, by accepting parts of the offer and rejecting other parts. Since he worked for eight months under the new terms, he is therefore deemed to have accepted those fresh terms, including those not favourable to him.

Legal Effect Of The Merger On Existing Employment Contracts

[37] The effect of the Vesting Order is a change of ownership of the business. Affin-ACF, consequentially no longer exists as a legal entity. All contracts of employment will, under this merger exercise, automatically end.

[38] The background facts of *Nokes* which draw a close parallel to our instant appeal, was summarised by Lord Atkins in his judgment. We feel that it is necessary to reproduce verbatim His Lordship's narration of those facts:

> The Hickleton Main Colliery Company, Ld., was a company working its pits in Yorkshire. Nokes in January, 1937, entered into a written contract of service with the company to serve it as a miner on the terms and conditions appearing in the bylaws in force at the company's collieries, and the company by this agreement agreed to engage Nokes on the same terms and conditions. The contract was in writing constituted by Nokes's signature to the contract book. At some time before June, 1937, the company together with six other colliery companies proposed an arrangement for amalgamating all the companies with a new company to be formed or then formed, namely, the Doncaster Amalgamated Collieries, Ld and as part of the scheme agreed with each other and with the said company to transfer their property rights and liabilities to the new company. I have to rely upon my recollection of the agreement which was produced at the hearing by counsel for the respondents: but I think that the new company were parties to the formal agreement. Application was made to the court under s. 153 for the approval of this scheme, and the scheme was duly sanctioned by Crossman J. on 22 March 1937. By an order dated 4 June 1937, made by Crossman J. on an originating summons dated 23 April 1937, issued by the Doncaster Amalgamated Collieries, Ld., it was ordered that all the property rights and powers of four of the amalgamating companies including Hickleton Main Company, Ld., as specified in the schedule and all other the property rights and powers of the

transferor companies, be transferred without further act or deed, to the transferee company and that the same should vest in the transferee company for all the estate and interest of the transferor companies therein. It was further ordered that all the liabilities and duties of the transferor companies should be transferred to the transferee company without further act or deed, and accordingly the same should, pursuant to s. 154, sub-s. 2, of the Companies Act, 1929, be transferred to and become the liabilities and duties of the transferee company. It was further ordered "that all proceedings now pending by or against the transferor companies "be continued by or against the transferee company", and that the transferor companies should deliver an office copy of the order to the Registrar of Companies and that on such delivery the transferor companies should be dissolved. This order follows very closely the terms of s. 154. The contention is that the effect of the section is to transfer all rights which a transferor company had against anyone at the date of the order whether on personal contracts or on contracts expressed to be non-assignable, or on property the rights in which ceased on assignment.

(Note s. 154 is similar to our own s. 178 of the Companies Act 1965).

[39] The House of Lords held that:

Where an order is made by the court under s. 154 of the Companies Act, 1929, for the amalgamation of two companies, a contract of service existing at the date of the amalgamation between a workman and the transferor company does not automatically become a contract of service between the workman and the transferee company.

[40] Applying that principle to this case, it means that the change of ownership *vide* the merger exercise would thus terminate the respondent's former contract of employment. Now, since the respondent is a non EA employee, and since there are no statutory provisions governing the position of a non EA employee, it is thus possible for the parties to regulate their relationship by entering into a new contract. With the former employment contract with Affin-ACF now at an end, the appellant was at liberty to offer him a fresh employment contract, *albeit* on less favourable terms. The appellant in our opinion, is not obliged to offer the respondent continuous employment on the same terms and conditions he previously enjoyed with Affin-ACF, the transferor company.

[41] There is no statute law in Malaysia governing employment contracts in a merger. We agree that the respondent's employment cannot be transferred to the appellant; his former contract of employment with the transferor company comes to an end. And the court or anyone else has no power to transfer any person against his will from the service of one person to another, because one has the right to choose for himself whom one should serve. (see Lord Atkin's speech in *Nokes*). From the same case, Viscount Simon LC opined that:

> … a contractual right to personal service was a personal right of the employer and was incapable of being transferred by him to anyone else, and that a duty to serve a specific master could not be part of the property or rights of that master capable of becoming, by transfer, a duty to serve someone else. It is, of course, indisputable that (apart from statutory provision to the contrary) the benefit of a contract entered into by A to render personal service to X cannot be transferred by X to Y without A's consent. The rule is so strict that if the contract is between individuals on both sides and X dies, the contract of service is immediately dissolved (*Farrow v. Wilson* [1896] LR 4 CP 744, 746) for A never promised to serve X's personal representative and X could only act as employer when alive.

Under Protest

[42] The facts of this case show that the respondent had been firm and unyielding on his stand that his retirement age should be 60 and not 55. When the appellant offered him a new contract of employment on 26 March 2005, which in clear terms stated his retirement age to be at 55, he accepted it under protest. This under protest qualification nullified his consent, if any. It means that there had been no *consensus ad idem* on the terms of employment, now on offer, notably on the shortened retirement age. It represents a qualified acceptance, not a valid one. Section 7 of the Contracts Act 1950 requires an acceptance, to be valid, to be absolute and unqualified. The insistence by the respondent that his retirement age be 60 and not 55 as now offered is tantamount to a counter offer and a rejection of the original offer

(*OTM Ltd v. Hydranautic* [1981] 2 Lloyd's Resp 211). This principle is endorsed by the Federal Court in *The Ka Wah Bank Ltd v. Nadinusa Sdn Bhd & Anor* [1998] 2 CLJ 486 where it was held that:

> 'an acceptance is a final an unqualified expression of assent to the terms of the offer.' But, where the reply is qualified or attempts to vary the terms of the offer or attempts to accept an offer on new terms (not contained in the offer), then such a reply is not a communication of an acceptance but may be a rejection accompanied by a counter-offer which the original offeror can accept or reject.

Black's Law Dictionary (2nd edn) defines "protest" as "an expression of dissent or disapproval, or affirms the act to be done against his will or conviction, the object being generally to save some right which would be lost to him if his implied assent could be made out."

[43] An illustration of this principle is found in *Rigby v. Ferodo Ltd* [1987] IRLR 516. In that case, the employees' wages were cut. They continued working but expressly did not accept the pay cut. The House of Lords held *inter alia* that 'nor could it be held that by working on, there was an implied acceptance on the part of the employee of the employers' repudiation. There was no basis upon which the employee's continued working and his acceptance for the time being and under protest of the wage that the employers, with full knowledge of his lack of agreement, chose to pay him, could be construed as an acceptance by him either of the repudiation by the employers of the original continuing contract or of the new terms which the employers were seeking to impose'.

[44] In our considered view, the appellant is at liberty to offer a fresh contract of employment, on different terms even if less favourable to the respondent from his previous terms of employment with the now defunct Affin-ACF. There is no prohibition in law to do so. The letter of offer dated 26 March 2005 is clearly a fresh offer of new employment, not of a continuous employment as contended by the respondent. It ends with the following qualification:

> This offer is subject to your acceptance of the following terms and conditions of service:
>
> 6. Retirement Age
>
> The retirement age shall be on your 55th birthday.

[45] In spite of his protest, the respondent worked with the appellant for eight months till retirement at age 55.

[46] In our view, the conduct of both parties, post the merger, shows that a fresh contract of employment has been agreed upon by them. In spite of his protest, the respondent commenced his employment with the appellant under the new terms and accepted the offer of fresh employment. He continued to work till his retirement age, at 55, in spite of the absence of any further negotiations on the age of retirement.

[47] We have considered the submission that the respondent had accepted the appellant's offer under inducement by his former employer, Affin-ACF. He alleged that in Affin-ACF's letter dated 29 March 2005, he was informed that the appellant had offered him continuous employment on no less favourable terms. This letter however came after the letter of offer from the appellant, dated 26 March 2005. Thus, when he received the Affin-ACF's letter the respondent was fully aware of the new terms now offered to him, ie, a fresh employment with new terms, (and not a continued employment) including a new retirement age at 55. We cannot conclude that there has been any misrepresentation or undue influence when the respondent accepted the new contract of employment.

[48] Under the original contract with Affin-ACF, the respondent may terminate his employment by giving sufficient notice to his employer. In this case he had waived that notice. Although there was no consensus between the parties as to the retirement age, the evidence as we viewed them, showed that the appellant stood firm on its offer that the retirement age be 55, and the respondent accepted to be employed under the new terms.

[49] The parties are now bound by their new contract of employment. Once the respondent accepted the new terms of the contract, he is deemed to have taken the benefit of that contract wholly; in other words he cannot now be seen to approbate and reprobate from the contract he has agreed to.

[50] We would therefore hold that the learned Judicial Commissioner had been wrong in exercising his discretion to allow for the declarations sought for by the respondent. We find that there had been a failure to judicially appreciate the factors surrounding this case, which in our opinion does not raise any special circumstances to grant those declarations as an exception

to the general rule of non-interference by the courts in contracts of service. In the final analysis, this case, in our opinion, rested purely on the contractual obligations of the parties under their new contract of employment.

[51] As for the question posed to us, we feel that our answer should only be confined to non EA employees, to fit into the factual circumstances of this appeal. We answer that question in the negative with a rider that its application be limited only to this case, and not to all merger situations.

[52] For these reasons, this appeal is allowed with costs and the orders made by the courts below are set aside.

Zainun Ali FCJ:

[53] The question posed before us for which leave was granted is this:

> Whether in a merger exercise involving a Business Transfer Agreement and a Vesting Order, a previous employee of Affin–ACF can only be offered employment contract by Affin Bank on terms and conditions of employment no less favourable than those existing between the employee and Affin-ACF.

[54] The question raised on the appeal is whether in the circumstances of the case in a merger exercise, the merged entity must offer employment to non EA employees on no less favourable terms than their existing terms of employment. On the authority of *Nokes v. Doncaster Amalgamated Collieries Ltd* [1940] AC 104 it seems that once a merger takes effect, all contracts of employment are terminated. The only way to preserve these contracts is to assign the contracts to the merged entity with the consent of the employee. If the employee consents to the assignment then he continues his employment on the same terms and with the same benefits with the new employer. If the employee does not consent then his contract of employment must be treated as terminated and the natural consequences of terminating a contract of employment will follow. Alternatively, the merged entity, can offer new employment. Again, an employee may accept or decline the new offer or he may insist on his previous employment contract being terminated and demand damages for its termination and at the same time negotiate with the merged entity concerning his future employment.

[55] As the facts of this appeal and the issues put forth by both parties have been comprehensively demonstrated in the majority judgment, I shall dispense with having to narrate them here, save where it merits emphasis or amplification.

Some Salient Background Facts

[56] In the midst of the discussion between Affin–ACF Finance Berhad (Affin-ACF) and the appellant for the merger exercise (before it was formalised), some concern was felt with regard to the fate of certain categories of employees such as the respondent.

[57] This is reflected in a letter dated 31 May 2005 to the appellant, where Encik Kamarul Zaman Nordin, Head of Human Resources of Affin–ACF, expressed his concern *vis-a-vis* the predicament the respondent and 103 employees like him would be faced with the merged entity. Encik Kamarul Zaman Nordin advised the appellant that in this connection, the vested rights of the said employees should be preserved, a fortiori when 46 of the 103 had taken out staff housing loans that will mature on or before their retirement age of 60. This group of employees include the respondent.

[58] As evidence have shown, the respondent and employees like him had voiced their grievance to the appellant to the unilateral alteration of their retirement age by a good five (5) years from 60 to 55. Thus the appellant was well aware of the discontent felt by the respondent and other employees like him.

[59] Emphasis however, was given by the appellant that in his letter of acceptance "under protest", the respondent did not assign any reason for his conditional acceptance. I fail to comprehend why the appellant chose to now feign ignorance thereof.

[60] The respondent's case is that:

(i) The appellant is bound to honor the respondent's contractual terms of employment that he had with Affin-ACF, particularly his term of age of retirement at 60, in reference to Order 5 of the Vesting Order.

(ii) Order 5 of the Vesting Order legally required the appellant to offer the respondent a continuous employment on terms not favourable and by unilateral impressing shorter retirement age on the respondent, the appellant had offered him less favourable terms and that this amounted to a breach of Order 5 of the said Vesting Order.

[61] The respondent sought various declarations in the High Court which were granted. They were for a declaration that:

(a) the plaintiff was entitled to work until the age of 60;

(b) Affin Bank was bound by the Vesting Order dated 26 May 2005;

(c) the contract dated 26 March 2005 unilaterally altered the term of retirement, which was never accepted nor agreed to by the plaintiff at any material time and which was induced by "undue influence";

(d) the plaintiff was entitled to ESOS that was offered before 22 February 2005;

(e) the plaintiff did not owe Affin Bank any housing loan, car loan and sundry loan.

[62] It is not disputed that when the respondent took on the position with Affin-ACF on 3 January 2000, the Affin-ACF handbook states that the former Affin Finance executives who joined prior to 1 January 1998 have a retirement age of 60 years old. The respondent came under this category.

[63] It is also not disputed that in June 2005, Affin-ACF entered into a Merger Agreement with the appellant resulting in the transfer of Affin-ACF's assets and liabilities to the appellant.

[64] It is undisputed that before the merger was formalised the appellant had issued a letter of offer dated 26 March 2005, to the respondent which *inter alia* reads:

> … As part of the integration process, the business of Affin-ACF Finance Berhad will be transferred to Affin Bank Berhad. The effective date of change of ownership of the finance company business of Affin-ACF Finance Berhad will be the date nominated by the High Court … pursuant to the provisions of the Banking

A and Financial Institution Act 1989 (the date of the Vesting Order). On the same date, Affin-Acf Finance Berhad will cease its finance company business and your employment with Affin - Acf Finance Berhad will have to cease.

However, we are pleased to offer you employment at Affin Bank
B Berhad will effect from the date of the cessation of your employment from Affin-ACF Finance Berhad.

... This offer is subject to your of the following terms and conditions of service:

C 1. ...

2. RETIREMENT AGE

The retirement age shall be on your 55 birthday. All the terms generally remain the same.

D

[65] From the above, it is clear that the main discord between the parties relate mainly to the reduction of the years of service. The letter of 26 March 2005 represents the appellant's offer-cum-appointment to the respondent. Although the respondent felt
E done by, by the terms and conditions therein, he nevertheless accepted the offer, *albeit* conditionally, and stated that he signed it since he was induced to do so by 'undue influence'.

[66] However three days after the appellant's letter of offer/
F appointment, Affin-ACF wrote to the respondent *via* a letter dated 29 March 2005, which *inter alia* stated that:

... we (Affin-ACF) are pleased to note that Affin Bank Bhd (appellant) had offered you continued employment on the same terms and conditions of employment *vide* its letter dated
G 26.3.2005 ...

[67] Given the contretemps facing him, matters came to a head when on 16 January 2006, the appellant notified the respondent by its letter of even date that his last day of service with the
H company will be on 22 February 2006, since on that day the respondent would be 55 years old.

[68] The respondent was forced to retire, despite his protests. His loans were thereafter converted to normal commercial rates. Due to the respondent's inability to service his loan the appellant
I send letters to foreclose his matrimonial home and filed two suits demanding the return of the respondent's staff loans which were originally pegged until the respondent reach his 60th birthday.

[69] It was only when the respondents was forced to retire ie, when he reached 55 years of age on 22 February 2006, that he was extended a copy of the Vesting Order and the Business Transfer Agreement.

[70] Under the circumstances, the respondent was of the view that he was constructively dismissed.

The First Ground

[71] As the first ground had already been answered by the majority judgment I shall not belabour the point.

The Second Ground

[72] However it is in the second ground that there is a parting of the ways with the majority view.

[73] It is the appellant's case that courts would not grant specific performance under an employment contract or to declare that an employee's dismissal has been invalid.

[74] The majority decision in this appeal found that the learned Judicial Commissioner in the High Court had been wrong in exercising his discretion to allow for the declarations sought for by the respondent. The majority judgment speaking through Abdull Hamid FCJ said that:

> ... We find that there had been a failure to Judicially appreciate the factors surrounding this case which in our opinion does not raise any special circumstances to grant those declarations an exception to the general rule of non-interference by the courts in contracts of service. In the final analysis this case in our opinion, rested purely on the contractual obligations of the parties under their new contract of employment.

The Issue

[75] Several issues come to mind when viewing the question posed before us, not least the question of whether the court below was entitled to make an order for a specific performance in respect of the terms of employment of contract between Affin-ACF and the respondent.

[76] It was the appellant's case that by declaring that the respondent was entitled to work till he attained 60 years of age, the court had imposed a different term in the respondent's contract of employment, requiring the appellant to perform that term, when clearly, specific performance of contracts of service cannot be granted.

[77] The position at common law is well established. Upon transfer of a business, an employee cannot, against his will, be obliged to work for a new employer who equally cannot be obliged to take him. It is a repudiatory breach of contract to purport to change the identity of an employer without the consent of an employee.

[78] In *Nokes (supra)* Viscount Simon LC observed that:

> … a fundamental principle of our common law … is that a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent.

[79] Thus the relationship between employer and employee has always been regarded by the common law as essentially personal.

[80] In this connection, consider the position of parties in the instant appeal.

[81] In March 2005, all the employees of Affin-ACF including the respondent were informed by its Chief Executive Officer in respect of an impending change of ownership of Affin-ACF whereby the appellant was to take over the business of Affin-ACF, which would see the merger of Affin-ACF with the appellant in April 2005.

[82] A relevant question would be: In the absence of a consensual agreement between the employee and the new employer following the transfer of a business undertaking in which that employee was employed, is the employee entitled to regard that such transfer as a repudiation of his contract of employment by the transferring employer, one in which he can sue for damages for wrongful dismissal?

[83] On the authority of *Nokes (supra)*, it is my view that the employee is so entitled. Lord Atkin (dissenting), recognized this right and similarly observed in *Nokes*, that at common law ...

> ... the transfer would unquestionably operate as a notice of dismissal of the employees and the liquidator before making it should in strictness take timely steps to determine the existing contracts of service and give the employees the opportunity of entering into fresh contracts with the new company ...

[84] Whilst I agree with the *Ridge v. Baldwin* principle (*Ridge v. Baldwin* [1964] AC 40) that "there cannot be specific performance of a contract of service and that the master can terminate the contract at any time and or for any reason or for none," there are exceptional cases or circumstances that exist which merit judicial intervention, as in the instant appeal, by way of declaration.

[85] The appellant's rival contention is that the learned Judicial Commissioner had not exercised his discretion correctly in granting the declarations sought for.

[86] I will discuss the existence of various circumstances which I consider to be either special or exceptional in the instant appeal, justifying judicial intervention in granting the relief sought.

Construction Of Documents Exchanged Between Parties

[87] It is my view that even if *Nokes (supra)* case is of limited assistance, it is still undoubtedly authoritative on the common law principle of the non-assignability of personal contracts (such as contracts of employment) without the consent of the employee.

[88] However in the context of answering the question posed, it is incumbent to view the contract as a whole.

[89] To recap, a flurry of communications had passed between the three parties involved – ie, between Affin-ACF, the respondent and the appellant.

[90] It is common place that in construing the intention of parties in the contract of employment between the respondent and appellant, it is permissible to look at evidence of the objective factual background **known** to the parties at or **before** the date of the contract, including evidence of the 'genesis' and objectively, the "aim" of the transaction. (emphasis added)

[91] It is common place too, that the court must construe a written agreement (even under seal) in the light of the circumstances surrounding its making. (See *Shore v. Wilson* [1842] 9 cl And Fin 355). This discipline is clearly embodied in the words of Lord Russel of Killowen who said in *HvalfangerselKapet Polaris A/s v. Unilever Ltd* [1933] 46 Lloyds Rep 29 that:

> … Before a court begins to construe a written contract, it must know all the relevant circumstances which exist and are within the knowledge of the contracting parties at the time when they make their contract.

[92] Thus in the same vein, Lord Wilberforce *inter alia* said in his two speeches in *Prem v. Simmonds* [1971] 1 WLR 138, and *Reardon Smith Line Ltd v. Yngvar Hansen* – Tangen [1976] 1 WLR 989 that:

> … we must inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object appearing from these circumstances, which the person using them had in view.

[93] So also in this appeal. What were the circumstances as it were, leading to the respondent's acceptance of the appellant's offer under protest?

[94] The parties ie, Affin-ACF and the appellant were in negotiation regarding the transfer of the former's business to the latter. Thus the communication which the appellant had with the respondent manisfested in its 26 March 2005 letter of offer and the letter from Affin-ACF made subsequently to the respondent on 29 March 2005, including the phrenetic slew of e-mails (in protest) from the respondent to the appellant, all point to the fact that the critical document (ie, the 29 March 2005 letter) did not exist in a vacuum. It was not a one-off contract which calls for an artless interpretation of the issue at hand.

[95] To reiterate, the appellant's 26 March 2005 offer which was followed by the Affin-ACF's letter of 29 March 2005 appear to be at odds with each other, in terms of tone and content.

[96] However in the context of the antecedent herein, it is my view that the said documents exchanged between the parties have to be construed as a whole and as a matter of construction, the letter of 29 March 2005 followed by the "under protest"

acceptance are the decisive document. In other words, the one who gets the last word in, wins. This principle is best illustrated in the case of *Butler Machine Tool Co Ltd v. Ex-Cell O Corporation (England) Ltd* [1979], WLR 401, where Lord Denning MR described a similar fact pattern as being a "battle of forms". Briefly, the facts in *Butler (supra)* are these:

[97] On 23 May 1969, the plaintiff sellers offered to deliver a machine tool for the price of £75,535. Delivery was to be in ten months and it was a condition that orders were accepted only on the terms set out in the quotation which were to prevail over any terms in the buyer's order. The seller's terms included a price variation clause whereby it was a condition of acceptance that goods would be charged at prices ruling at date of delivery. The defendant buyers replied on 27 May 1969, giving an order with differences from the seller's quotation and with their own terms and conditions which had no price variation clause. The order had a tear-off acknowledgment for signature and return which accepted the order "on the terms and conditions thereon." On 5 June 1969, the sellers after acknowledging receipt of the order on 4 June, returned the acknowledgement form duly completed with a covering letter stating that delivery was to be "in accordance with our revised quotation of 23 May for delivery in … March/April 1970."

[98] The machine was ready about September 1970, but the buyers could not accept delivery until November 1970. The sellers invoked the price increase clause and claimed £2,892 for the increase due to the rise in costs between 27 May 1969, and 1 April 1970, when the machine should have been delivered. Thesiger J, gave judgment for the sellers for £ 2,892 and interest.

[99] On the buyer's appeal, the appeal was allowed. It was held that the buyers' order of 27 May 1969 was not an acceptance of the offer in the seller's quotation of 23 May, but a **counter-offer** which the sellers had accepted by their letter of 5 June 1969, when the contract was completed without any price limitation clause (see *Hyde v. Wrench* [1840] 3 Benv 334 & *Trollope and Cells Ltd v. Atomic Power Constructions Ltd* [1963] 1 WLR 333, [1962] 3 All ER 1035 applied. (emphasis added)

[100] Lord Denning MR observed that the documents passing between the parties have to be construed as a whole and as a matter of construction, the letter of 5 June 1969, is the decisive document.

[101] The position in the present appeal bears a similar circumstance. It is not unreasonable to regard the Affin-ACF letter of 29 March 2005 indicating the respondent's re-employment "on the same terms and conditions" as fortifying the issue that the respondent was to be taken on a continuous employment. Note that the merging parties (the appellant and the respondent) were in active negotiations and thus the last word on the matter would be the 29 March 2005 letter, followed by the respondent's "under protest" acceptance on 3 June 2005.

[102] What is important from the surrounding circumstances, is that despite the 3 June 2005 acceptance 'under protest' by the respondent of the appellant's offer, the appellant took on the respondent's employment.

[103] In view of the above, what then is the position of parties? Lord Denning in *Butler*'s case *(supra)* stated that the better view is to look at **all** the documents passing between the parties – and "glean from them, or from their conduct whether they have reached agreements on all material points – even though there may be differences between the forms and conditions ..." (emphasis added)

[104] As Lord Cairns said in *Brogden v. Metropolitan Railway Co* [1877] 2 App Cas 666, 672

> ... there may be a consensus between the parties far short of a complete mode of expressing it, and that consensus may be discovered from letters or from other documents of an imperfect and incomplete description ...

[105] Thus in such a 'battle of forms' as is apparent in this appeal and as supported by several authorities, there is a contract as soon as the last of the forms (in this case, the acceptance by respondent, *albeit* under protest) is sent and received without immediate objection being taken by the appellant. Though the appellant appeared to have taken an uncompromising position *vis-a-vis* the issue of the retirement age, all other terms were accepted and appeared acceptable and the respondent continued his employment with the merged entity.

[106] Had the appellant regarded the respondent's "under protest" acceptance as legally not binding, the only course of action to be taken by the appellant is to reject the respondent's conditional acceptance without further ado, and terminate his contract of employment forthwith.

[107] But did the appellant do that?

[108] They did no such thing; instead the appellant accepted the respondent's employment for a good eight months thereafter. Although the parties communicated sporadically on the same "age of retirement" issue, the appellant did nothing to stop the respondent from working in the company and in fact accepted his service for the next eight months.

[109] The appellant's conduct post the conditional acceptance raises the questions of whether:

(a) the said conduct amounts to an estoppel; and

(b) the acceptance made "under protest", giving new terms, amount to a counter offer.

[110] The "new" term given by the respondent is the counter offer of his retirement at age 60.

[111] This conundrum was succinctly worded by Lord Denning in *Butler (supra)*, who said that:

> … in some cases the battle is won by the man who fires the last shot. He is the man who puts forward the latest terms and conditions; and if they are not objected to by the other party, he may be taken to have agreed to them …

[112] Such was also the position in *British Road Services Ltd v. Arthur Crutchley & Co Ltd* [1968] 1 Lloyd's Rep 27 where Lord Pearson echoed the same sentiment and cited Professor Guest in *Anson's Law of Contract* when he said that 'the terms of the contract consist of the terms of the offer, subject to the **modifications** contained in the acceptance." (emphasis added)

[113] Thus it is clear from the authorities above that the terms and conditions of both parties are to be construed together.

[114] Lord Denning went on to observe that:

> If they (the terms) can be reconciled so as to give a harmonious result, all well and good. If differences are irreconcilable – so that they are mutually contradictory – then conflicting terms may have to be scrapped and replaced by a reasonable implication.

[115] Thus on the authority of *Butler (supra)* it is my view that the documents in this appeal are to be considered in their entirety. In my view, to take one or two documents out of the dynamics of the whole, would lend an artificial and cursory regard to the entire merger exercise.

[116] Secondly as the appellant's offer was not fully accepted and that the appellant appears willing to accept them on the respondent's own terms, one has to look at what happened after the respondent made his counter offer, since the ball now lies squarely in the appellant's court.

[117] As was clearly spelt out by the Federal Court in *The Ka Wah Bank Ltd v. Nadinusa Sdn Bhd and Anor* [1998] 2 CLJ 486,

> an acceptance is a final and an unqualified expression of assent to the terms of the offers. But where the reply is **qualified** or attempts to **vary** the terms of the offer or attempts to accept an offer on new terms (not contained in the offer), taken such a reply is not a communication of an acceptance but may be a rejection accompanied by a **counter offer which the original offeror can accept or reject** … (emphasis added)

[118] It bears repetition that the appellant had to either reject or accept the respondent's counter-offer.

[119] In this case there was no immediate rejection of the respondent's counter-offer. On the contrary, the appellant allowed the relationship of employer and employee to continue unabated for the next eight months. By so working, it does not in any way mean that the respondent had accepted the "new" terms imposed by the employer. Bear in mind that it was the respondent (not the appellant) who made the counter-offer. So the fate of their contractual relationship now lies in the appellant's hand. Not the respondent's.

[120] The above principle is amply provided in *Rigby v. Ferodo Ltd* [1987] IRLR 516, in which the employees were similarly circumstanced. The employees in that case continued working but expressly rejected their pay cut. The facts in *Rigby (supra)* are as follows:

[121] The employee was a lathe operator and had been first employed by the employer in 1964. He was a member of a union and in 1982 was entitled to 12 weeks' notice of termination of his contract. In that year the employer encountered serious financial difficulties. In consequence, the employer proposed a 5 per cent. reduction in wages to the union, and warned that, if this were not agreed, it would have to be imposed. In September, the union suggested two alternative proposals, the alternatives being dependent upon whether or not the union members took industrial action. The employer warned that there was no alternative to reductions in wages and, on 18 September, set out in writing the reduced rates which it applied from that date. The union held meetings of its members at which the only votes taken were in relation to the possibility of taking industrial action; no vote was taken on whether or not to accept the wage reductions. The union itself did not agree to accept the reductions, although it indicated to the employer that no industrial action would be taken. The employee instituted proceedings for damages for breach of contract in 1984. Ognall J held that the employer had underpaid the employee and ordered an inquiry as to damages. The Court of Appeal dismissed the employer's appeal.

[122] On appeal by the employer, it was held that in the absence of the employer seeking to terminate the contract of service it had with the employee, the employer had sought to compel the employee to accept a wage that was less than what he was entitled to under the contract; that the employee in continuing to work and receiving a reduced payment under protest had not accepted a variation in the terms of the contract and, therefore, he was entitled to recover the difference between his contractual entitlement and the amount paid by the employer either in damages for breach of the contract or in debt.

[123] Lord Oliver in the House of Lords *inter alia* observed that:

> … Faced with that situation the appellant could have chosen to terminate their contracts on proper notice. It chose not to do so. It could have dismissed them out of hand and faced the consequences. It chose not to do so. It continued to employ them, week by week, under contracts which entitled them to a certain level of wages but withheld from them a part of that entitlement. I can, in those circumstances, see no answer at all to Mr. Rigby's claim and the trial judge and the Court of Appeal were, in my judgment, plainly right in the conclusions at which they arrived.
>
> It has been submitted that there was some sort of implied acceptance on the part of Mr. Rigby of the appellant's repudiation by working on. At the trial this was put on the basis of estoppel, waiver and acquiescence. All three were rejected by the trial judge and, in my judgment, he was, on the facts which he found, quite plainly right to reject them. I can, for my part, see no other basis upon which it can be argued that the continued working by Mr. Rigby and his acceptance for the time being and under protest of the wage that the appellant, with full knowledge of his lack of agreement, chose to pay him is to be construed as an acceptance by him either of the repudiation by the appellant of the original continuing contract or of the new terms which the appellant was seeking to impose.

[124] Clearly both parties were aware of each other's terms but when the acceptance is conveyed in such a form as to make it apparent that what is accepted is not the offer as made, but what the acceptor wants it to be, by conduct (in accepting the respondent counter-offer) the appellant had impliedly accepted the respondent's counter-offer.

[125] As was also clearly illustrated in *Halsbury's Laws of England* 2nd edn at p. 137:

> … Where one party intends to make a contract on one set of terms and the other intends to make a contract on another set of terms, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that the others has agreed to the terms of the others. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into the contract with him, the person thus conducting himself is bound as if he had intended to agree to the other party's terms.

[126] Whilst it is undeniable that the appellant seemed unbending in its refusal to give in to the respondent's plea of his retirement at 60, the fact remains that the appellant, in not terminating the respondent's service with immediate effect, had by implication, accepted the respondent's counter-offer and it is not open for it to now deny its obligation. The appellant is therefore estopped by conduct.

Inequality Of Bargaining Power: Unconscionable Transaction

[127] A related, but no less important element in this appeal relates to the issue of the doctrine of inequality of bargaining power. The respondent had *inter alia*, pleaded undue influence to describe the predicament he found himself in.

[128] Although the courts below did not overtly rest their case on this ground, it is clear that the unconscionability of the transaction remains materially relevant, based on undue influence. From the facts and evidence as had been adduced, the parties to the merger could not be said to have taken reasonable steps to avoid being tagged with constructive notice of the appellants' undue influence over the respondent; clearly, neither the potential extent of the respondent's liability had been explained to him nor had the respondent ever received independent advice. In fact, the respondent was given a copy of the business transfer agreement and Vesting Order only after his 'forced' retirement. In the instant appeal, a substantial change is made to the respondent's working conditions to his detriment.

[129] What are the facts in the instant appeal to justify the applicability of the doctrine?

[130] On the facts it is clear that the appellant and the respondent did not meet on equal terms, although that circumstance alone does not call for the court's intervention on equitable or other grounds and whilst this doctrine (of the inequality of bargaining power) may be a new jurisprudential approach in our jurisdiction, it has gained popular approval in both England and Australia.

[131] In Australia (at least), the test to be applied as to whether equitable relief is applicable if unconscientious advantage is taken of a party who is at a special disadvantage in a contractual dealing (as happened in the instant appeal) is manifold. The first

A requirement is that there has to be existence of circumstances which amount to a special disadvantage; the second is that the court concerns itself with the conduct of the stronger party, rather than with the reality of the weaker party's consent. In other words, the conduct of the stronger party will be seen as being B unconscionable if he knew or ought to have known of the special disadvantage and took advantage of it to further his interests. Thirdly, it relates to evidence of the value of the transaction; fourthly to lack of independent advice and lastly if it can be shown that the stronger party can clearly discern, at the time of C the contract, that the weaker party is sufficiently weak, as to make it *prima facie* unfair for the stronger party to accept the contract.

[132] The above situation was described neatly as a form of "contractual imbalance" by Lord Brightman in *Hart v. O'Connor* D [1985] AC 1000.

[133] At the risk of being perfunctory on the applicable test to be applied, *albeit* when this is a novel concept in our jurisprudence, it can safely be said that on the evidence, the impugned transaction smacks of inequality in the parties' bargaining level. In E fact the adverse position the respondent is faced with upon merger in the instant appeal was further heightened when there was no form of compensation (such as Voluntary Separation Scheme (VSS) etc) offered to him, which would provide him with an option whether to stay put or move on elsewhere.

F

[134] In the words of the Court of Appeal speaking through Gopal Sri Ram JCA in *Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98, the respondent was in this instant, 'overmatched and overreached'.

G

[135] Although it may not be clear as to whether in the scheme of things, there is such an inequality of bargaining power, it is my view that in the instant appeal, the relative positions of the parties are such that one has unconscionably taken advantage of the H "necessity" of the other.

I

The Effect Of The Business Transfer Agreement And Vesting Order

[136] It was contended by the appellant that by virtue of cl. 7.1 of the Business Transfer Agreement, the respondent is excluded as an "employee" within the meaning assigned to it under the Employment Act 1955.

[137] Learned counsel of the appellants contended that it was not Affin-ACF's intention nor the appellant's to have the respondent's previous contract of service transferred through the Business Transfer Agreement, since he did not come within the class of employees intended under that clause.

[138] A further contention of the appellant's is that cl. 7.1 qualified its application as to obligation of the appellant to offer a new contract of employment on no less favourable terms only to employees of Affin-ACF whose wages do not exceed RM1,500 per month. Since the respondent's salary as manager stood at RM8,950 per month, the respondent does not therefore come within the definition of employee as defined in s. 2 of the Employment Act (EA) and the scheme under cl. 7.1.

[139] With respect, I do not agree with the above view. A careful perusal of the Business Transfer Agreement (BTA) would clearly manifest that *inter alia*, cl. 7.1 thereof is a special clause that deals with employment contracts, but the clincher is this: it does not deal with all employment contracts. Clause 7.1 of the BTA only applies to EA employees and so it cannot be treated as a special clause that overrides a general clause.

[140] The appellant's contention would suggest that since cl. 7.1 made specific reference to employment contracts, it does not favour the respondent, who is a non EA employee, since his employment contract falls outside the scope of cl. 7.1.

[141] I disagree with the appellant's contention on the basis that the maxim *generalia specialibus non derogant* only applies when the special clause (cl. 7.1 in this case) and the general clause **both** apply to the respondent. Here the special clause in Order 5 of the Vesting Order applies to all contracts and hence applies to the respondent's contract of employment, whereas cl. 7.1 of the BTA applies only to contracts of employment for EA employees and does not therefore apply to the respondent who is a non EA employee. (emphasis added)

[142] To reiterate, Order 5 stipulates:

> On the effective date, any existing agreement to which AACF was a party to or any AACF contract (as defined under the Business Transfer Agreement) is to have effect as if the ABB had been a party thereto instead of ACF …

[143] Note: ABB is the appellants and

ACF is Affin-ACF.

[144] The Business Transfer Agreement defines Affin-ACF contracts as "any agreements contract, deeds, indentures, deed, polls or instrument to which Affin-ACF is or has ever been a party." In this connection, the Affin-ACF, employment contracts include the respondent's employment contract with Affin-ACF. Note the fact that the offer of employment was made before the merger, which by virtue of the Vesting Order became effective on 1 June 2005.

[145] Thus even if cl. 7.1 of the Business Transfer Agreement appears to preclude the respondent, it is axiomatic that after the merger, by virtue of the prior offer, the respondent's employment contract comes under the broad rubric of "contract" as juxtaposed in Order 5 of the Vesting Order.

[146] Thus the effect of Order 5 of the Vesting Order is to transfer all non EA contracts to the appellant, subject to an implied right for the employee to opt out. This right to opt out is provided by legislation in other jurisdictions – which actually merely confirms the common law position on this point. In any case this 'implied' right must follow as a result of the principle that an employee cannot be forced to work for the new employer.

Effect Of Vesting Order When Made Pursuant To Statute

[147] Perhaps the most substantial argument in this entire appeal relates to the Vesting Order or the implication thereof in its true legal sense.

[148] It was contended by the appellant that the effect of the Vesting Order is a change of ownership of the business where Affin-ACF no longer exists as a legal entity; that all contracts of employment will end automatically. A contract of personal service is not assignable without the employee's consent (*Nokes* case) *(supra)*.

[149] The appellant's major standpoint is this; that the transfer under order 5 of the Vesting Order is "only of things and contracts which are their very nature, assignable. The appellant said since the respondent had not consented to the assignment of his employment contract to the appellant, the Vesting Order cannot in law, transfer his contract of employment to the appellant and that it effectively terminated his employment of the respondent with Affin-ACF.

[150] The appellant's further contention is that as a result of the merger the respondent's contract of employment is terminated; and since the respondent is a non EA employee and since there are no statutory provisions governing the position of a non EA employee, it is possible for parties to regulate their relationship by entering into a new contract. The appellant contended that it is at liberty to offer the respondent a fresh employment contract, *albeit* on less favourable terms. The appellant steadfastly held on to the fact that it is not obliged to offer the respondent continuous employment on the same terms and conditions he previously enjoyed with Affin-ACF, the transferor company.

[151] With respect, I do not agree with the appellant's contention above. Firstly, it is trite that a vesting order of the court is of such a nature that there is no requirement in law actually, to effect a substitution of the parties, since the effect of the vesting order is that a successor company (in this case the appellant) is deemed to be a party to all proceedings. This is borne out by high authority (see *Leong Moh Sawmill Co Sdn Bhd v. Standard Chartered Bank & Ors* [1997] 2 CLJ 131)

[152] It must be borne in mind that the Vesting Order was made pursuant to s. 50(3) of the Banking and Financial Institutions Act, 1989 (BAFIA). It is to ensure that the transfer of any property or business or agreements pursuant to an order of the High Court under s. 50(1) shall, from the transfer date, be vested in or held by the transferee and that the order shall have effect according to its terms notwithstanding anything in law or in any rule of law (*Leong Moh (supra)*).

[153] Thus statute (in this case s. 50(3) of BAFIA) overrides common law, as the Vesting Order was made pursuant to a statute.

A **[154]** A case on this point is *Stansell Ltd (formerly Stansell (builders) Ltd v. Co-Operative Group (CWS) Ltd* [2006] 1 WLR 1704.

[155] Briefly the facts of *Stansell (supra)* are as follows:

B **[156]** In March 2000, the Co-Operative Group (CWS) Ltd, transferred the whole of its property, assets and engagements to another society, and the transferor society ceased to exist after its cancellation from the register the following month. The transferee society *(Stansell)* sought to bring a claim for alleged defective C building work against the builders under a building contract, which the transferor society had entered into some years previously. The contract contained a clause prohibiting assignment of the benefit of the contract without consent.

D **[157]** On an arbitration to determine as a preliminary issue whether the transferee society was entitled to claim under the contract, the arbitrator held that s. 51 overrides the contractual prohibition on assignment so that the society was entitled to pursue its claim. The judge allowed the builder's appeal, holding E that the section did not have the effect of overriding the contractual rights of third parties.

[158] On appeal by the society the appeal was allowed. It was held that the self-evident purpose of s. 51(1) of the 1965 Act was F to enable or authorise one registered society to transfer to another its engagements and its property so as to vest the transferring society's property with the minimum of formality; that the natural and ordinary meaning of the section was broad enough to include the liability of a society to its members and to third party etc.

G **[159]** Section 51 confers on a society registered under the 1965 Act the power to make a transfer of its engagement to another registered society. The Co-Operative Group (CWS) contended *inter alia*, that s. 51 enables engagements to be transferred so far as concerns the members of the society, who must be taken to H have accepted this.

[160] The court found that there could be a statutory assignment of both the rights and liabilities of the transferring society which would be effective, notwithstanding the express prohibition against I assignment in cl. 18.1.1. However the provisions are subject to

savings for the rights of creditors of a society in s. 54 to the effect that amalgamations or transfer of engagements: "shall not prejudice any right of a creditor of any registered society which is a party thereto." A

[161] The question posed in the *Stansell* case *(supra)* is whether upon amalgamation there is automatic vesting of property, assets or rights without the need for any conveyance or assignment. B

[162] It was submitted by *Stansell* that the transfer of engagements pursuant to s. 51(1) did not negate the common law position, but could only transfer what was capable of being transferred at common law. In relation to the impact of statutory provisions on the assignment of contracts which are not assignable at common law, *Stansell* relied strongly on *Nokes* case *(supra)*. This relates to s. 154 Companies Act 1929 (the predecessor of s. 427 of the Companies Act 1985. Section 154 was described by Lord Atkin at p. 1034, as providing for the transfer of property from one company to another, followed by the dissolution of the transferor company. He described it as a "procedural section" affecting dealings with third parties which "should not be construed so as to transfer rights which in their nature are by law not transferable." C D E

[163] It is apparent that *Nokes* case *(supra)* is a leading case on what is transferable in the context of statutory provisions relating to the transfer of property from one company to another. Section 154 was held not to include contracts of service. The common law doctrine was that contracts of service are not assignable. F

[164] However it was held by Mummery J, that the "self-evident purpose of the provision of s. 51(1) was to enable or authorise one registered society to transfer to another society its engagements (its business undertaking) and its property with the minimum of formality – simply by passing a resolution, which would have the statutory consequence of vesting the transferor's property without the need for a conveyance or assignment. The language of "a transfer of engagements" is broad enough to include the liabilities of a society to its members and to third parties and the rights of a society against its members and against third parties and to cover contracts which would not ordinarily be transferable without the consent of the other party, such as contracts of service with employees of the transferring society …" G H I

[165] Thus *Stansell*'s case which involves a Vesting Order as such has to be distinguished from *Nokes*. The issue in *Nokes* was the effect of an order under s. 154 of the Companies Act 1929 on a contract of service. The question was whether, when a court makes an order under s. 154 transferring all the property and liabilities of the transferor company to the transferee company, such order has the result that a contract of service previously existing between an individual and the transferor company automatically becomes a contract between the individual and the transferee company. The focus of *Nokes* was on the 'non-assignability at common law of a contract of personal service without the consent of the employee and that such contracts are not considered a "property" within the meaning of s. 154.

[166] But as Mummery J explained in *Stansell (supra)* s. 51 is materially different from the provisions of the Companies Act (either s. 154 of the 1929 Act or s. 427 of the 1985 Act) which are in the nature of procedural sections and so do not affect substantive law rights.

[167] In *Stansell (supra)* s. 51 is a substantive provision intended to achieve objectives, specific to the case of industrial or building societies.

[168] Likewise, s. 50(3) of BAFIA is a substantive provision, intended to achieve the specific objective of facilitating agreements or arrangements for the transfer of whole (or part of) businesses or licensed institutions, which enable such business or licensed institutions by statute, to transfer engagements and to amalgamate.

[169] It would be instructive to illustrate the provision of s. 50(3) of BAFIA. It reads thus:

> 50(3) Where the order of the High Court under subsection (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings, or had no notice of the proceedings under this section or of any other related proceedings.

[170] Thus from the language and intent of s. 50(3) of BAFIA, it is clear that a statutory assignment of both the rights and liabilities of the transferring company (in this case Affin-ACF) to the appellant is effective and provides for an automatic vesting of property, assets or rights overriding any common law principles.

[171] *Stansell*'s case *(supra)*, which is a decision of the English Court of Appeal makes clear that such a Vesting Order made pursuant to a statute overrides common law.

[172] Thus to answer the question posed earlier as to what is the effect of the Vesting Order, the answer can be neatly summarised thus:

[173] That, from a reading of the provisions of the Vesting Order, the effect of it, particularly Order 5 thereof, is to transfer all non EA contracts to the appellant, subject to an implied right for the employee to opt out.

[174] Clearly it was not the intention of the merged entity to terminate all non EA contracts. The Vesting Order makes it clear that the said employment contract (including the respondent's) is binding on the appellant by operation of law, subject to the respondent's right to opt out, in view of the respondent's overriding right (as employee) to choose his employer.

[175] Thus it is irresistible to conclude that given the tenor of the Business Transfer Agreements and the Vesting Order, the appellant had breached these two instruments in not honouring the respondent's Employment Contract of 3 January 2000 and had not given him his vested rights under the two instruments which legally bind the appellant.

[176] Clearly the underlying assumption of fact and law intrinsic in the two documents hold good and should therefore bind the appellant.

[177] It is my view therefore that in view of the above, there was a reasonable and even a legitimate expectation on the respondent's part that his terms of contract of employment will continue as before, with no adverse consequences visiting him. In short, there is no room really, for the appellant to "cherry pick"

A the employees or the terms of their employment, since the appellant is bound by law to comply with the said legal instruments; in short, the appellant is to take on the existing workforce from the transferor's business on their existing terms and conditions.

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[178] In my view, the learned Judicial Commissioner had made correct findings of fact and law, having had due regard to the circumstances including any injury or prejudice that may be caused to the affected party being taken by surprise. The said findings have also been affirmed unanimously by the Court of Appeal. I see no reason whatsoever to interfere with the said findings.

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[179] With respect, the interpretation by the appellant of the legal position *vis-à-vis* the respondent is constrictive, manifesting its lack of preparedness to honor its obligations.

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[180] Thus I would dismiss this appeal with costs and the orders made in the courts below affirmed.

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